CHAPTER 5 ANTI-DUMPING MEASURES

1. OVERVIEW OF RULES

(1) Anti-Dumping Measures

"Dumping" is defined as a situation in which the export price of a product is lower than its selling price in the exporting country. A bargain sale, in the sense of ordinary trade, is not dumping. Where it is demonstrated that the dumped imports are causing injury to the competing industry in the importing country within the meaning of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), pursuant to and by investigation under that Agreement, the importing country can impose anti-dumping measures to provide relief to domestic industries injured by imports.[1]

The country's imposition of an anti-dumping duty is determined by the dumping margin--the difference between the export price and the domestic selling price in the exporting country. By adding the dumping margin to the export price, the dumped price can be rendered a "fair" trade price. When it is impossible to obtain a comparable domestic price because there are none or low volume sales in the ordinary course of trade in the domestic market, either export prices to third countries or a "constructed value" is used in price comparison. A "constructed value" is the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. Similarly, when the export price is found to be unreliable, the price at which the product is first resold to independent buyers, or another price according to a reasonable basis determined by the authorities may be used in price comparison.

Because anti-dumping measures are an exception to the rule of MFN treatment, the utmost care must be taken in invoking them. However, unlike safeguard measures, which are also instruments for the protection of domestic industry, the implementation of anti-dumping measures does not require the government to provide offsetting concessions or consent to countermeasures taken by the trading partner. This has increasingly led to the abuse of anti-dumping measures. For example, anti-dumping investigations are often commenced based on insufficient evidence, and anti-dumping duties may be retained long after the conditions for their levy have been eliminated. In light of this situation, one of the focal points of the Uruguay Round negotiations was to establish disciplines to rein in the abuse of anti-dumping measures as tools for protectionism and import restriction. Although considerable progress was seen during negotiations, many countries still express much concern over this abuse.

(2) Legal Framework

(i) International Rules

The international anti-dumping rules are provided by (a) GATT Article VI and (b) the Anti-Dumping Agreement under the WTO. As a result of the Uruguay Round negotiations, the Tokyo Round Anti-dumping Code was revised to become the new Anti-Dumping Agreement. Amendment of the Code was called for because the procedures for investigating prices and costs in order to measure the damage to domestic industry and calculate dumping

[1] "Injury" includes three cases: material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry.

margins were extremely technical and complex. The Tokyo Round Anti-dumping Code also lacked sufficient detail to deal with the complexities of current international transactions. The Code's lack of detail resulted in a dearth of effective disciplines and exacerbated the tendency to abuse the anti-dumping provisions.

The WTO holds two meetings of the Anti-Dumping Committee (AD Committee) each year to provide a forum for discussion of anti-dumping measures. Among the business of the AD Committee is the review of countries' anti-dumping implementation laws for conformity to the Agreement, the hearing of reports on countries' anti-dumping measures, and the study of issues in anti-dumping policies and practice. The AD Committee is directly subordinate to the Council for Trade in Goods and reports to it each year on the implementation and administration of the AD Agreement.

The AD Committee has also organized on an *ad hoc* basis two fora for discussions of specific points of contention. The first is the meeting of the Informal Group on Anti-Circumvention. This was an issue that was referred to the AD Committee for further study because no conclusions could be reached on it during the Uruguay Round negotiations (see 1(5) below). The second is the meeting of the *Ad Hoc* Group on Implementation, which discusses ways to harmonize national discretion in the agreement where the interpretation is or could be vague. Having separate fora to discuss specific issues of concern has enabled the WTO to deal with anti-dumping problems on an ongoing basis.

Countries have been amending their domestic anti-dumping implementation legislation to bring it into conformity with the new AD Agreement. In Japan, for instance, this took the form of amendments to Article 9 (Article 8 at present) of the Customs Tariff Law and other relevant regulations. However, it is still uncertain whether new national legislation in WTO Member countries will be administered in conformity with the new Agreement. The AD Committee is charged with reviewing national legislation, and countries are required both to notify the relevant laws to the Committee and to respond to questions from other countries about their systems. If there are any problems found, countries are obliged to bring their national laws in line with the Agreement. Japan must use these kinds of fora to ensure that the domestic laws of other countries are written and applied in conformity with the AD Agreement. Should legislation or discretion contravene the Agreement, Japan should report it immediately to the AD Committee and other GATT/WTO fora to seek appropriate remedies. Therefore, if an anti-dumping measure is suspected of violating the GATT and/or Anti-Dumping Agreement, Japan should seek resolution through the GATT/WTO in dealing with the increased abuse of anti-dumping measures by certain countries. If resolution cannot be reached through bilateral consultations, the abuses should be referred to WTO panels.

In the past, there were two viewpoints: first, that panels should have broad discretion, second, that certain standards of review (both objective and impartial) should be set for panel deliberations. The reasoning for the latter view was as follows. Since many cases for resolving disputes were expected to arise due to the newly introduced automaticity in the WTO dispute settlement system, it was considered necessary to specify standards of review for anti-dumping measures. As a result of the Uruguay Round negotiations, the new Anti-Dumping Agreement also introduced new standards of review for factual determinations and legal interpretations by the panel. How the standards of review are applied to procedures for resolving disputes will depend on the specific facts of the future actions and on the panelists themselves. The issue will be re-examined following the application of these standards over

the first three years pursuant to a Ministerial decision adopted at Marrakesh[2], but no examination has been done so far.

(ii) Changes in the Anti-Dumping Agreement

(a) Fair Price Comparison

In principle, a determination of dumping is based on whether the export price of a good is less than the domestic price in the exporting country. This comparison must be conducted in a fair manner. So far, the determination of the normal value and/or export price is sometimes not sufficient to adjust the differences that affect price comparability. The Anti-Dumping Agreement prescribes that comparison shall be made at the same level of trade, in respect of sales made at as nearly as possible the same time, that due allowance shall be made, on its merit, for differences which affect price comparability (Article 2.4), and that the authority shall make allowances for a conversion of currencies (Article 2.4.1). Authorities shall also indicate to the parties in question what information is required for a fair comparison and shall not impose an unreasonable burden of proof on those parties (Article 2.4.2).

So far, in the United States and the European Union, in cases involving more than one transaction, all export prices higher than the weighted-average domestic price were regarded to be the same as the weighted-average domestic price, and thus no credit was given for "negative" dumping margins. This practice results in artificial dumping margins, and the inflation of actual margins.

Thus, in comparing domestic and export prices, the United States and European Union compared a weighted average of all domestic prices with the export price of each individual transaction (See Figure 5-1). The Anti-Dumping Agreement takes into account this point, prescribing that margins shall be established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis (Article 2.4.2). However, because price comparison is left to investigating authorities' discretion, we need to monitor carefully their investigation on this point.

<Figure 5-1> An Example of Unfair Price Comparison

	Domestic Price($)	Export Price($)	Dumping Margin($)
Transaction 1	400	400	-150 -> 0
Transaction 2	300	300	- 50 -> 0
Transaction 3	200	200	+50
Transaction 4	100	100	+150
Average Value	250	250	0

Note : Even though these individual prices are identical, and the overall average prices are identical, the US Government will find dumping. Specifically, the US authorities compare the domestic average value of $250 to individual export prices. Then the US authorities treat the so-called "negative dumping margins" as zero when an export price is higher than the $250 domestic average value. As shown, this methodology results in an artificial dumping margin of 20 percent despite the fact that the margin would be zero if the comparison were made between average prices or on the basic of individual transactions.

[2] "The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."

$$\text{dumping margin percent} = \frac{0 + 0 + 50 + 150}{400 + 300 + 200 + 100} * 100 = 20\%$$

(b) Problems Involved in Determining Injury

Under the Anti-Dumping Agreement, imposition of an anti-dumping duty requires that the investigating authority have evidence not only to substantiate dumping, but also to prove that the dumping has resulted in injury to a competing domestic industry in the importing country. Dumping may result in benefits to consumers in the form of lower-priced goods and is thus not an entirely deleterious practice. Under the terms of the GATT, a country can take actions against dumping only when there is a factual finding of injury to an industry in an importing country.

The Tokyo Round Anti-Dumping Code did not clearly set forth the conditions necessary to establish injury. Unfortunately, the prior provisions have lent themselves to different interpretations by different countries. The Anti-Dumping Agreement contains more detailed rules on determinations of injury. It is difficult, however, to develop a general quantitative standard to measure the extent of injury that has occurred.

We must therefore be aware of the potential problems in discretion. Specifically, we must ensure that sufficient evidence is considered when determining injuries, that there is sufficient proof of causality between dumping and injury, and that there is no potential for injury from other factors unrelated to dumping imports to be counted in with dumping injury.

(c) Other Points

The Agreement contains many improvements over the Tokyo Round Anti-Dumping Code. The following are among the most important improvements.

i) The Agreement clarified the method used in calculating dumping margins by establishing:
- New criteria for determining sales below cost (Article 2.2.1),
- Adjustment mechanisms for start-up costs (Article 2.2.1.1),
- The acceptance of cost calculation based on the generally accepted accounting principles in the exporting country (Article 2.2.1.1), and
- New criteria for setting profit rate in constructed value, (Article 2.2.2).

ii) The Agreement clarified investigation procedures through:
- Introduction of quantitative criteria for initiating proceedings (Article 5.4),
- Termination of investigations upon a determination of *de minimis* dumping margins (less than 2 percent of the export price) or negligible import volumes (Normally import volume will be considered negligible if it is less than 3 percent of total import volumes, on an individual country basis. If the aggregate volume of imports from all negligible countries exceeds 7 percent, negligibility will not apply) (Article 5.8),
- Establishment of strict time limits (normally 1 year with extension up to no more than 18 months after initiation)(Article 5.10),
- New disciplines on refunds of Anti-dumping duties (Article 9.3.1-3),
- New disciplines on sample-based investigations (Article 6.10), and
- New disciplines requiring accelerated investigations of new market entrants (Article 9.5).

iii) The Agreement introduced a sunset clause:

- The sunset provisions is one of the most valuable and important improvements, It requires anti-dumping duties to be automatically terminated no later than five years from their imposition except in cases where investigating authorities have conducted reviews on their own initiative or upon a duly- substantiated request made by the domestic industries, and a determination that dumping and injury would continue or resume. Under the old system the United States has rarely terminated anti-dumping duties once it imposed them. This change is, therefore, very important, and we need to keep a watch on the US administration of anti-dumping measures. (Article 11.3)

iv) Other changes provided in the Agreement include:

- New disciplines on cumulative assessment of injury (Article 3.3) and
- Standards of review for WTO dispute panel (Article 17.6).

Administration of the above new regulations will need to be closely monitored to ensure that they are realized in actual application.

(3) Recent Trends

Anti-dumping investigations have been used primarily by the United States, the European Union, Canada, and Australia, because domestic anti-dumping laws have been enacted mostly in developed countries. However, the increase in actions brought by Brazil, South Korea, India, and South Africa is a recent development worthy of note. In addition, many other developing countries have recently introduced new anti-dumping laws. Figures 5-2 and 5-3 show the increasing number of investigations by each country. Figure 5-4 shows the number of cases, by country, where anti-dumping duties have been imposed against Japan.

It is necessary to scrutinize carefully whether proceedings and methods of such new “AD users” are consistent with the Anti-Dumping Agreement.

There are also more cases being brought against habitual users of antidumping measures like the US and the EU. This trend will need to be watched carefully as well. (See Chapter 18 for details.)

<Figure 5-2> Number of Anti-Dumping Investigations, by Country

	1969-1974	1975-1979	1980-1984	1985-1989	1990-1994	1995-1999	Total
US	125	140	146	219	249	120	999
EU	19	55	138	101	147	151	611
Canada	42	74	176	115	90	51	548
Australia	-	120	242	180	252	89	883
Japan	0	0	0	0	4	0	4
Others	39	64	10	74	227	576	990
Total	225	453	712	689	969	987	4035

Source: WTO documents
Note: Figure valid as of the end of June 1999

<Figure 5-3> Number of Anti-Dumping Investigations since 1994

	1994	1995	1996	1997	1998	*1999
US	45	14	21	16	42	27
EU	43	32	24	43	21	32
Canada	2	14	5	14	11	10
Australia	13	5	17	42	15	10
Brazil	2	5	17	10	21	3
Korea	4	4	13	17	3	2
India	7	5	21	14	35	33
South Africa	15	17	31	23	41	7
Indonesia	-	-	9	4	8	-
Japan	1	0	0	0	0	0

Source: WTO documents
Note: Figure valid as of the end of June 1999. The symbol – means non-notification

<Figure 5-4> Number of Cases where Anti-Dumping Duties were Imposed on Products Imported from Japan

US	EU	Canada	Australia	Korea	India	Taiwan	Mexico	South Africa	Indonesia	Malaysia	Egypt
56	7	3	2	5	6	2	1	1	1	1	1

Figure valid as of the end of November 1999
Note: Number includes interrupted and price undertaking cases

(4) Economic Implications

Anti-dumping measures are allowed under the GATT/WTO Agreement as an exception to the general disciplines. However, admitting selective imposition of duties in terms of country and supplier tends to lead to discriminatory trade policies. In addition, since anti-dumping measures directly affect pricing, which is the most fundamental element of business strategy, their abuse will have a tremendous negative impact on the pattern of trade and on the overall economy.

(i) The Influence of the Initiation of Investigation

The mere initiation of an anti-dumping investigation will have a vast impact on exporters. When an anti-dumping investigation is initiated, the potential surfaces for anti-dumping duties to be imposed at some point in the future. This results in products becoming far less attractive to importers.

Initiation of an anti-dumping investigation also places significant burdens on the companies being investigated. They must answer numerous questions from the authorities in a short period of time, spending enormous amounts of labour, time and money to defend themselves. The legal costs involved are particularly high. For example, in one case involving high-volume exports to the United States, the legal fees alone were $1 million a year. Such burdens obviously have the potential to impair ordinary business activities. Thus, regardless of their findings, the mere initiation of an anti-dumping investigation is in itself a large threat to companies.

This reasoning supports the contention that investigations should only be initiated after evidence is sufficiently considered. Any decision to go ahead with an investigation must be made with the utmost care. We would also note that there are many cases in which companies simply relinquish all or part of their right to answer questions from the authorities because of the enormous burdens involved. In such cases, the rule of “facts available” (sometimes called “best information available”) applies. In “facts available” proceedings, the authorities make calculations from whatever information they have been able to gather if the company investigated has not furnished answers or is unable to prove its contentions.

“Facts available” handling is explicitly allowed by the Agreement, and should naturally apply in cases in which the company was able to respond but did not for its own reasons. But as we have noted, there are also cases in which companies are forced to relinquish their right to respond because the questions are so detailed and probing that the burden of response is too great. The paradox is obvious. Authorities, in their excessive zeal to collect detailed information and run rigorous investigations, end up having to use “facts available” procedures instead. Such procedures are also, we would note, in contravention of Article 6.13 of the AD Agreement, which states, “The authorities shall take due account of any difficulties experienced by interested parties in supplying information requested, and shall provide any assistance practicable.” From this standpoint, United States law provides that where the administering authority relies on anti-dumping complaint, the authority must corroborate the information in the petition from other information. We should watch carefully how the United States administers this provision.

(ii) Distortion of Normal Commercial Practices

Anti-dumping measures also harm companies attempting to apply normal commercial strategies and practices. This effect is illustrated in situations of “forward pricing” in advanced technology products and “business cycle” pricing in industries with high fixed costs. These two cases are explained below together with the new Anti-Dumping Agreement provisions designed to ameliorate these problems.

Forward pricing is a strategy designed to reduce costs by increasing sales volumes early in a product’s life cycle. At the start-up phase of high-tech products, prices are set at a level below the per unit cost on the assumption that there will be a sharp reduction in such costs in

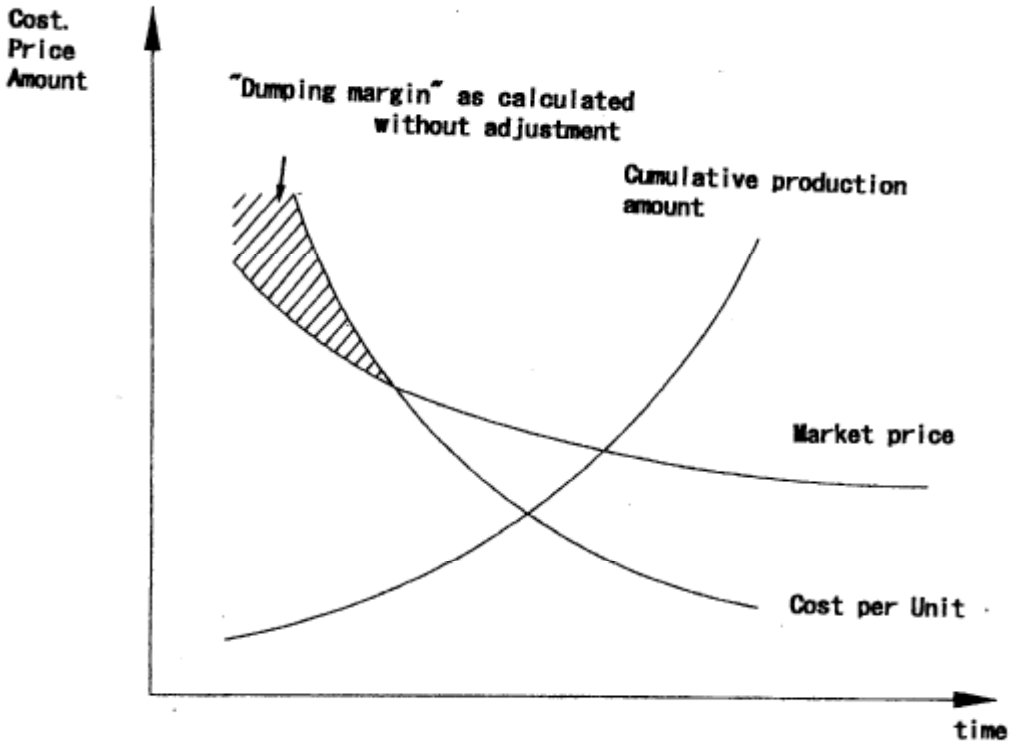
the near future as production volumes increase. This practice not only enables rapid market acceptance of a product, it also allows companies to secure stable profits in a short period of time. One example comes from the US civil aircraft industry. The latest B-777 (which seats 350) cost about 500 billion yen to develop, but the costs incurred in building the aircraft drop, as more aircraft are built, in part because of significant improvements in worker skills. Aircraft manufacturers, therefore, set sales prices far below initial costs in anticipation of these productivity gains (See Figure 5-5.).

When an anti-dumping investigation of a forward-priced product takes place early in the product cycle, short-term average costs will still exceed domestic prices. Domestic sales will accordingly be deemed to be “below cost” and unusable for purposes of calculating anti-dumping duties. When domestic sales are unusable, the Anti-Dumping Agreement allows the use of a “constructed value” of the exported good in the dumping margin calculation. The theoretical “constructed value” in such cases will be composed of the unusually high short-term average costs plus amounts for administrative costs and profits. This “constructed value” is then compared to the actual export price, resulting in a high dumping margin.

This forward-pricing problem has been partially addressed in the Anti-Dumping Agreement. The Agreement incorporates a provision calling for adjustments to properly allocate costs during the start-up period for new products. The provision calls for adjusting costs based on costs at the end of the start-up period or, if that period is beyond the period of investigation, the most recent costs that can be taken into account when determining whether products are being sold below cost. We will need to monitor closely whether countries will accurately administer these anti-dumping procedures and make proper adjustments for start-up costs.

On the other hand, concerning the cost reduction on a long term basis in the future, it is natural that the prospect of cost reduction offered by the defendant in the investigation should not be adopted without examination. Thus it is necessary to examine whether a reasonable method can be implemented that will address this concern.

<Figure 5-5> Illustration of Forward Pricing



In capital-intensive materials industries, such as steel, companies frequently set prices in view of the full business cycle, which results in wide swings in their ratio of fixed costs to unit production because of changes in production volumes. Since prices are also affected by the relative strength of demand and supply in the market, it is difficult to raise prices during a recession. Because of this, normal practice is to set prices under the assumption that fixed costs will be recovered over the long term. In the past, the United States has not taken into account the possibility of long-term cost recovery when dealing with intermediates like steel. It calculated-fixed per unit costs based only on production volumes during the one-year period investigated, and because of this practice, often determined that products were being sold below cost. This practice has been criticized since 1974 for ignoring production and business cycles, and US courts themselves have rendered verdicts critical of the use of data covering only the short period under investigation. The current US practice appears to be to collect cost data for a 12-month period. The European Union engages in similar practices. While more specific provisions regarding business cycle pricing were discussed during the Uruguay Round negotiations, only general standards for recognizing below-cost sales were included in the Anti-Dumping Agreement. These new standards restrict the recognition of below-cost sales only to situations in which such sales occur within an extended period of time, in substantial quantities, and occur at prices, which do not provide for recovery of all costs within a reasonable time. Based on these new standards, therefore, normal business cycle pricing practices such as these should be fully taken into consideration.

(iii) Effects on Technology Transfers (Absurd Expansion of the Product Scope Subject to Anti-Dumping Duties)

Anti-dumping duties are imposed on “like products” found by investigators to be

dumped on domestic markets (GATT Article VI). However, depending on how the scope of "like products" is defined, there could be cases in which anti-dumping duties are imposed on products that are in fact different from the product subject to investigation. We are particularly concerned about vague wording in the definition of the range of products subject to dumping investigations. Care must be taken with regard to products that could or will be developed in the future so that the definition cannot be expanded beyond those products "currently" causing injury (according to the parties filing the complaint).

There are cases where the definition has even been expanded to apply to future generation products not even existing at the time of the original investigation. Given the nature of the products in the cases mentioned above and the wide differences between the original and current versions of the products, authorities ought to investigate whether or not the new products, in view of the differences in technology used and markets targeted, are having a detrimental impact on the domestic markets initially investigated. There are obvious problems in expanding the application of existing anti-dumping measures without doing so. We have strong expectations for more appropriate administration in this regard.

If the scope of "like products" are expanded absurdly, it should an adverse influence on new product development, consumer choice and, ultimately, technological advancement. This is particularly the case in high-tech industries, like electronics. Suffice it to note here that all such cases demonstrate the potential impediment to technological progress that comes from facile expansions of the coverage of "like products" in anti-dumping proceedings.

Retarding Globalization of Production

As the economy becomes more global in scope, companies are transferring their production overseas to their export markets or to developing countries where costs are lower. However, when such transfers take place for products that are subject to anti-dumping levies, they are often assumed to be attempts at circumvention. Anti-circumvention measures which inadequately distinguish between production shifting for legitimate commercial reasons and for circumvention purposes, risk not only distorting trade but also shrinking investment.

(iv) Conclusion

As this discussion indicates, the economic effects of abusive anti-dumping measures can be substantial in terms of trade volume and critical to a wide range of business activities. Unfortunately, importing countries can easily resort to such practices because they can be accomplished under the guise of measures sanctioned by the GATT/WTO and the Anti-Dumping Agreement. For these reasons, use of anti-dumping measures as a means of restricting imports has increased substantially in recent years. It should also be noted that often the most serious victims of abusive anti-dumping measures are the consumers and user industries in the importing country.

(5) Anti-Circumvention Issues

"Circumvention" generally refers to an attempt by parties subject to anti-dumping duties to avoid paying the duties by "formally" moving outside the range of the anti-dumping duties order while "substantially" engaging in the same commercial activities as before.

The Uruguay Round negotiations defined three kinds of circumvention: importing country circumvention, third country circumvention and "country-hopping."[3] Disciplines on measures to prevent these practices were also discussed, but conflicting opinions between interested countries prevented any final conclusion from being reached. The Marrakesh Ministerial Declaration merely states the expectation that uniform rules will be applied as soon as possible, and refers the issue to the AD Committee. In light of the large amounts of time already spent negotiating the issue without success, the AD Committee began its discussions by looking at approaches that could be used to seek a resolution. This has resulted in an agreement on the framework for future considerations (procedures and agenda). There have also been substantial, unofficial discussions on what constitutes circumvention, which is the first item on the agenda.

The basic conflict over anti-circumvention is between the United States, the European Union, and other countries that already have anti-circumvention rules and wish to legitimize them, and a large number of other countries, led by Japan, who are wary of introducing these measures because they could restrict even legitimate investment activities, potentially

[3] Below are the basic kinds of circumvention discussed by most countries:
(a) Falsified customs declarations and other clear illegalities.
(b) Switching to exports of products that have only minor differences with those subject to anti-dumping duties (slightly modified product).
(c) Exporting the parts for products subject to anti-dumping duties to the importing country and assembling them there (importing country circumvention).
(d) Exporting the parts for products subject to anti-dumping duties to a third country and assembling them there (third country circumvention).
(e) Exporting products subject to anti-dumping duties from third countries ("country-hopping").

contracting and distorting both trade and investment.

Resolving this conflict will require striking a balance between the current AD Agreement and any future anti-circumvention measures. Doing this will require taking into account the benefits brought by the globalization of corporate activities and the basic principles and goals of the WTO Agreement. This will in turn require an analysis of specific cases that illustrate how trade is conducted to seek measures that do not impair legitimate trade and investment while still strengthening the disciplines of the current AD Agreement.

On the other hand, the fact remains that there are, at the current time, no uniform rules on anti-circumvention in the WTO Agreement. Should countries that have domestic laws on anti-circumvention take measures that depart from GATT Article VI or the AD Agreement, they will need to be dealt with rigorously within the GATT/WTO context.

(6) Response to Dumping in Japan

Japan has three laws and ordinances that come under the AD Agreement: Article 8 of the Customs Tariff Law, the Cabinet Order on Anti-Dumping Duties and the Guidelines on Procedures for Countervailing and Anti-dumping Duties. Up to 1991, only three anti-dumping cases had been filed in Japan, none of which led to an investigation. Japan initiated its first official anti-dumping investigation in October 1991, concerning ferro-silicon-manganese imported from China, South Africa, and Norway. In January 1993, a final determination to impose anti-dumping duties on Chinese exporters was made after a positive finding of dumping and injury and a causal relationship between them (two of the Chinese exporters agreed to a price undertaking with the Japanese government). In January 1998, this measure was terminated pursuant to the sunset clause.

In December 1993, a dumping complaint was filed on imports of cotton yarn from Pakistan. The investigation began in February 1994, and after a year and a half of impartial and rigorous study, it was found that dumping had in fact caused material injury to the domestic industry. An anti-dumping duty was therefore imposed. Should there be other dumping complaints received in the future, Japan should investigate them according to international rules in a transparent, impartial, and rigorous manner.

<Box-1>The Discussion of Anti-dumping Measures in the WTO Working Group on the Interaction between Trade and Competition Policy

On the grounds that there is a close interaction between competition policy and trade policy, the first WTO Ministerial Meeting held in Singapore in December, 1996 decided to establish a working group to study issues relating to the “interaction between trade and competition policy.” It was originally decided that the General Council would determine after two years’ study how the work should proceed, but at the Working Group meetings held at the end of 1998, a report from the Working Group to the General Council was adopted requesting an extension. No clear termination point has been set for the extension.

As for the discussion on antidumping measures, the Working Group put “the impact of trade policy on competition” on the agenda for its fifth meeting, which was held in July 1998. Japan focused in particular on the anti-competitive effects of antidumping measures in this meeting. Pointing out the difference in handling under Competition law compared with Anti-dumping law of an identical activity, namely predatory pricing, Japan emphasized the need for review of antidumping regimes from the perspective of competition policy. Japan has taken active part in the discussions, submitting some opinion papers to the 1999 meeting as well.

Japan has argued that, since the interaction between competition policy and trade policy is examined in the WTO regime, the Working Group should consider ways to ensure the consistency between trade policy and competition policies, above all, there is a need to carry this out through discussion of the existing Anti-dumping Measures, because it is pointed out that demonstrated that trade policies such as antidumping measures and countervailing duties have anti-competitive effects. On the other side of the argument is the United States, which is opposed to a review of antidumping measures and urges that the Working Group should focus on competition policy and leave trade measures alone.

(7) Anti-Dumping cases in the WTO dispute settlement process

Since the WTO was established, there have been a total of 23 consultations requested under the disputes settlement procedures because of antidumping measures. Two of these cases were brought by Japan. In 9 cases instances panels have been established, and as of this writing 2 reports had been adopted (as of the end of January 2000, see Figure 5-6).

Some of the cases that resulted in panels involved disputes that have an impact on Japan. As a result we will briefly outline the two for which reports are available and provide brief summaries of additional panels on which Japan has expressed its intention to participate as a third party.

1) The Guatemala antidumping case

Mexico requested consultations with Guatemala over violations of GATT Article VI and the Anti-Dumping Agreement, alleging that the antidumping investigation performed by Guatemala for Portland cement imported from Mexico was neither fair nor objective. The main point of dispute was over the fact that Mexico requested bilateral consultations prior to Guatemala taking a final determination on its antidumping investigation and consequent measures. This raised the question of the relationship between disputes settlement procedures in Article 17 of the Anti-Dumping Agreement and WTO disputes settlement procedures as defined in the Disputes Settlement Understanding (DSU).

The panel found Article 17 of the Anti-Dumping Agreement to constitute “special rules” as defined in Article 6 of the DSU, and therefore determined it to be acceptable to question the agreement’s conformance of a member's dumping procedures even if a final antidumping duty had not been decided. It went on to find Guatemala in violation of its obligations under the Anti-Dumping Agreement.

The Appellate Body, however, found the relationship between the Anti-Dumping Agreement and the DSU to be one of “mutual complementation.” The provisions of Article 17 of the Anti-Dumping Agreement did not fully replace those of the DSU. Thus it overturned the panel decision and dismissed the Mexican suit. This interpretation has clarified that WTO disputes settlement procedures can be resorted to for antidumping violations only in the three cases specified in Article 17.4 of the Anti-Dumping Agreement: 1) to levy definitive anti-dumping duties, 2) to accept price undertakings, or 3) to levy provisional measures that cause significant impact.

In light of the results of the case, Mexico again requested WTO consultations after the final antidumping duty was imposed. A panel is now reviewing the case.

2) The Korean DRAMS case

In its third annual review, the United States decided not to revoke the antidumping duty order on DRAMS from Korea. Korea responded by requesting consultations pursuant to WTO disputes settlement understanding, arguing that the US Department of Commerce (DOC) regulations and the results of the annual review violated the GATT and the Anti-Dumping Agreement. The main issue was whether the “not likely” criterion in the section 353.25(a)(2) of the DOC regulations which provides that “the Secretary may revoke an order or terminate a suspended investigation if the Secretary concludes that: i) …have sold the merchandise at not less than foreign market value for a period of at least three consecutive years; and ii) it is ‘not likely’ that those persons will in the future sell the merchandise at less than foreign market value… is inconsistent with the “injury would be ‘likely’ to continue or recur" criterion in the Article 11:2 of the Anti-Dumping Agreement.

The panel found that the "not likely” criteria of the DOC regulations did not necessarily match the "likely to continue or recur" criteria of Article 11.2 of Anti-Dumping agreements and therefore concluded the section 353.25(a)(2)(ii) of the DOC regulations, and the Final Results Third Review based on that provision were inconsistent with US obligations under Article 11.2 of the Anti-Dumping Agreement. The panel recommended that the United States bring the provision and measure into conformity with its obligations under Article 11:2 of the Anti-Dumping Agreement.

The United States did not appeal. The DOC regulations were amended as advised, and the review was reopened based on the new rule. Under the amended regulations antidumping duty was not revoked either.

In the DSB meeting held in January of this year Korea reserved its right under Article 12.5 of the DSU to establish a panel to judge whether the recommendation had been implemented, arguing that the US had not appropriately complied with the panel recommendation.

The DOC regulations at the crux of this case have a vast impact on Japan since Japan is also subject to a plethora of US antidumping measures. We will therefore need to monitor developments in the case.

3) Panels on which Japan participates as a third party

There are three panels for antidumping cases on which Japan currently participates as a third party. The dispute between Korea and the US on steel antidumping duties directly impinges on Japanese interests, but Japanese participation is often based on other concerns, such as a desire to prevent the arbitrary administration of antidumping regimes or a desire to collect specific information on how the Anti-Dumping Agreement is administered and what the problem points are.

<u>EU anti-dumping measures on cotton bedding from India</u>

India requested the establishment of a panel in April 1999, claiming violations of Articles 2, 3, 4, 5, 12, and 15 of the Anti-Dumping Agreement and Articles 1 and 6 of the GATT because the EU antidumping investigations lacked transparency and ignored India's position as a developing country. The panel was established in November, and proceedings

are on going.

Thai anti-dumping measures on Polish steel

Poland requested the establishment of a panel in October 1999, claiming violations of Articles 2, 3, 5, and 6 of the Anti-Dumping Agreement and Article 6 of the GATT because of problems in the methods Thailand used to calculate dumping margins and to determine injury and because of insufficient provisions of information. The panel was established in November, and proceedings are on going.

US antidumping measures on Korean steel products

Korea requested the establishment of a panel in October 1999, claiming violations of Article 6 of the GATT and Articles 2, 6, and 12 of the Anti-Dumping Agreement because of problems in the methods used by the US to calculate and impose dumping margins. The panel was established in November, and proceedings are now on going.

<Figure5-6> Anti-dumping cases in the WTO disputes-settlement process after the establishment of the WTO

DS number	Date of requesting consultation	Plaintiff	Defendant	Commodity concerned	Situation
DS23	**1995.12. 5**	Mexico	Venezuela	Certain Oil Country Tubular Goods	Termination
DS49	**1996. 7. 1**	Mexico	United States	Fresh and Chilled Tomatoes	Termination
DS60	**1996.10.15**	Mexico	Guatemala	Portland Cement	The appellate body report was adopted.
DS63	**1996.11.28**	European Union	United States	Solid Urea from the Former German Democratic Republic	Consultation
DS89	**1997. 7.10**	Korea	United States	Color Television Receiver	Korea's withdrawal
DS99	**1997. 8.14**	Korea	United States	Dynamic Random Access Memory Semiconductors	The panel report was adopted.
DS101	**1997. 9. 4**	United States	Mexico	High-Fructose Corn Syrup	Consultation
DS119	**1998. 2.20**	Switzerland	Australia	Coated Wood Free Paper Sheet	Mutually agreed solution
DS122	**1998. 4. 6**	Poland	Thailand	Iron or Non alloy steel and H-beams	Panel
DS132	**1998. 5. 8**	United States	Mexico	High-Fructose Corn Syrup	Panel
DS136	**1998. 6. 9**	European Union	United States	Anti-Dumping act of 1916	Panel

DS140	**1998. 8. 3**	India	European Union	Unbleached Cotton Fabrics from India	Consultation
DS141	**1998. 8. 3**	India	European Union	Cotton-Type Bed-Linen	Panel
DS156	**1999. 1. 5**	Mexico	Guatemala	Gray Portland Cement	Panel
DS157	**1999. 1.14**	European Union	Argentina	Drill Bits from Italy	Consultation
DS162	**1999. 2.10**	Japan	United States	Anti-Dumping act of 1916	Panel
DS168	**1999. 4. 1**	India	South Africa	Certain Pharmaceutical Products	Consultation
DS179	**1999. 7.30**	Korea	United States	Stainless Steel Platen Coils and Stainless Steel sheet and strip	Panel
DS182	**1999.10. 5**	Mexico	Ecuador	Grey Portland Cement	Consultation
DS184	**1999.11.18**	Japan	United States	Certain Hot-Rolled Steel Products	Consultation
DS185	**1999.11.18**	Costa Rica	Trinidad and Tobago	Pasta	Consultation
DS187	**2000. 1.17**	Costa Rica	Trinidad and Tobago	Macaroni & Spaghetti	Consultation
DS189	**2000. 1.26**	European Union	Argentina	Carton-Board Imports from Germany Ceramic Floor Tiles from Italy	Consultation

2. PROBLEMS OF TRADE POLICIES AND MEASURES IN INDIVIDUAL COUNTRIES

(1) United States

While the United States is one of the most open markets in the world, it still has elements of unilateralism and protectionism in its trading systems. Anti-dumping legislation is perhaps the largest source of hidden protectionism in the United States, and many countries have complained about its shortcomings. Some of these problems have been remedied in the Uruguay Round implementation legislation, in which the United States brought certain parts of its anti-dumping system in line with the new Anti-Dumping Agreement. This progress is among the most noteworthy achievements of the eight-year long Uruguay Round negotiations. Notwithstanding these improvements, there are two concerns. First, in some areas, the US implementing legislation could be interpreted or applied in ways that may be inconsistent with the Anti-Dumping Agreement. Second, even in areas where the implementing legislation seems to be clear, there is a concern that actual practice under the new provisions might violate the intent of the Anti-Dumping Agreement. Therefore, it will be very important to monitor closely the future administration of the US anti-dumping law, and if there exist any problems, to point them out.

(i) Recent Trends

First on the list of problematic dumping cases from recent years is the large number of AD cases in steel products of 1992 involving nineteen different countries. The countries subject to this investigation have pointed to numerous problems with it, including the abuse of "best information available" procedures in calculating dumping margins, and irregularities in the identification of injury. Another problematic case was the complaint involving supercomputers, in which the actions of the government of the United States prior to the initiation of the investigation were opaque and questionable.

We also find the cause-and-effect relationship for injury to be questionable in Large Newspaper Printing Presses, Gas Turbo-compressors cases.

Thus, even though the number of complaints being filed is lower than in the 1980s and continues to decline, there are questions about the discretion of those implementing the system that point to the need for continued watchfulness.

In accordance with Article 11.3 of the Anti-Dumping Agreement, sunset reviews began in July 1998 for more than 300 "transition orders".

Since the summer of 1997 there have been 11 antidumping complaints filed against Japanese steel products. Japan has expressed concerns about abuse of the US system, and requested to establish a panel concerned with the GATT and the Anti-Dumping Agreement violations in the hot-rolled steel sheets case, for which the US had reached a final affirmative determination. (See 8 for details.)

There is also a WTO panel currently meeting on the question of whether the US antidumping Act of 1916 is consistent with the WTO Agreement. (See 9 for details.)

<Box-2> Problems with the Procurement of Supercomputers from Japan

(1) Background

(i) In May 1996, NEC's bid was selected for final contact negotiations for a supercomputer system to be procured by the National Center for Atmospheric Research (NCAR). Anomalous actions by the US Government could be seen regarding this matter as summarized below.

<Action by the United States>

(a) The National Science Foundation (NSF), which provided budgetary support for the supercomputer procurement, sent a letter to University Corporation for Atmospheric Research (UCAR), which runs NCAR, explaining that it had been advised that the Department of Commerce (DOC) reached the preliminary conclusion that NEC's procurement proposal was equivalent to dumping, and that the NSF would not allow budgetary support unless there was sufficient documentation to demonstrate the contrary. This letter was sent even though the Anti-dumping investigation had not yet been initiated (17 May 1996).

(b) Documents suggesting dumping by NEC were made available both to the press and to Cray Research (the US supercomputer manufacturer having also participated in the procurement bidding) prior to the initiation of the Anti-dumping investigation on May 20, 1996.

(ii) After that, NCAR froze negotiations with NEC, and in August, 1997 decided to exclude NEC from its approved vendors.

(iii) In July, 1996, Cray filed a complaint alleging dumping by NEC, and in, August 1997 the DOC determined that dumping had occurred. The following September, the US International Trade Commission (ITC) found that US industry had been threatened with material injury and imposed an Anti-dumping duty.

NEC appealed the AD investigation by the DOC as invalid, but the Supreme Court dismissed its appeal in February, 1999.

(iv) In November of that year, NEC and Fujitsu filed a suit with the US Court of International Trade (CIT) claiming problems in the determination of injury. The CIT submitted its opinion to the ITC in December, 1998 in which it instructed the ITC to reinvestigate a part of NEC's claims. In March, 1999, in its remand determination the ITC found that the US industry was threatened with material injury. The ITC's remand determination was delivered to the CIT and the CIT affirmed ITC's remand determination in December, 1999.

(2) Points of contention

Actions by the US Government in that it alleged and made public the preliminary analysis that dumping had occurred prior to the initiation of the Anti-dumping investigation, could be seen as anomalous. For example, if the measures taken affected imports only, this case may be in violation of WTO rules as a potential violation of the national treatment obligation.

During the Japan-US Supercomputer Consultation (November, 1997), Japan sought an explanation from the US Government, urged it to maintain the transparency of US trade policy and measures, and sought assurances from the United States that such anomalous actions would not be repeated.

(ii) Problems Involved in Applying Anti-Circumvention Measures

The revised US anti-dumping law states that anti-dumping duties will only be imposed when the investigating authorities find that dumping has caused domestic industry injury in accordance with GATT Article VI and the AD Agreement. Where it departs from the WTO Agreement is in also providing for measures traditionally used by the United States to prevent the circumvention of anti-dumping duties. These measures provide for expanded application of the original anti-dumping duty under set conditions if the companies subject to anti-dumping duties attempt to circumvent them by shifting production to factories in the importing country or third countries and selling the products from there, or by directly or indirectly selling products that have been subject to only minor modifications from those covered by anti-dumping duties, or similar products later developed.

To determine whether products produced in the importing country (the United States) or a third country are guilty of circumvention, the investigating authorities look at the price ratio of imported parts from the country subject to anti-dumping duties in the finished product or the composition ratio of products produced from those parts. They may also take into account patterns of trade, the relationship between exporters and importers, changes in import volumes, levels of investment and research and development in the United States or third countries, the nature of the production process, and the extent of the production facilities. There are, however, no standards of judgement for any of these items. Nor are their standards of judgement for minor modifications or later developments. This leaves a large amount of discretion to the investigating authorities. For example, they have to consider both value-added ratios and parts procurement ratios when they look at product composition ratios, but there are no numerical standards given, and, therefore, there is no objectivity. In considering the "relationship between exporters and importers," there is a danger of companies being judged to be "affiliates" even though there are no capital relationships as long as one of the companies is legally or operationally in a position to exercise restraint or direction over the other.

In short, while the United States has amended the conditions for applying its anti-dumping laws consistent with the Uruguay Round negotiations, it also includes measures like these for which there is no justification in the WTO Agreement, which are worded vaguely (as we have shown above), and which have the potential to obstruct legitimate investment activities.

The United States conducted an anti-circumvention investigation on Korean Colour Television Sets (which was terminated without conclusion). Initiating such an investigation just as the AD Committee is discussing anti-circumvention measures would seem to be an attempt to impede the impartial discussions of the Committee, and is problematic.

(iii) Problems Involved in Determining Dumping

The United States has restructured the basis for price comparison. There are three major new elements to the comparison. First, the new law adds a provision to deduct from the "constructed export price" (which replaces the prior "exporters sales price") an allocated portion of total profit. Second, the new law clarifies the importance of making comparisons at comparable levels of trade and revising the provisions on level of trade adjustments. Third, the new laws limits the offset for indirect selling expenses to those situations where a proper

level of trade comparison or level of trade adjustment cannot ensure price comparability (the CEP offset).

The new laws state that the profit of a related importer shall be deducted from the constructed export price. However, it is not clear how profit in the normal value shall be accounted for. We need to monitor this point. In addition, US law prescribes several factors to be considered in determining "affiliated parties," but in actual administration the authorities consider only the percentages of shares held. This raises the risk that parties that are not, in essence, "affiliated parties" will nonetheless be deemed to be so.

The Anti-Dumping Agreement contains revisions requiring in principle that export price and normal price should be compared by either, weighted averages to weighted averages, or individual transactions to individual transactions. However, it also permits exceptions to this principle under certain conditions. The United States interpreted that this article applies only to original investigations, but not to administrative reviews. For this reason, under the US laws in administrative reviews it is possible to compare weighted average normal price and individual export prices. Though this is one permissible interpretation, in light of the fact that final determination of dumping margin is made in administrative review, it is desirable that the United States compare weighted averages to weighted averages, or individual transactions to individual transactions. Moreover during the original investigation, there were cases in which comparisons of weighted average normal prices were not used. We will therefore need to monitor this issue in the future.

(iv) Problems Involved in Determining Injury

The Tokyo Round Anti-Dumping Code did not clearly set forth the conditions necessary to establish injury. Unfortunately, the prior provisions have lent themselves to different interpretations by different countries. For example, in the case of Japanese flat panel displays, four types of products that were not "like products" were simultaneously subject to investigation. Although some of the products were clearly not injuring the domestic industry, the US authorities found injury by aggregating the four products and imputing the injury on some products to other products.

The US International Trade Commission ("ITC") must make its preliminary determination regarding injury within 45 days of the petition. This period seems to be too short a time to prepare counter-arguments challenging whether injury did indeed occur or whether there was a causal relationship between dumping and injury. The enormous steel complaint of 1992 that involved nineteen countries (twenty-one when countervailing duties are included) is an example of the problems in determining causality. The case involved what amounted to half (by value) of all steel imported by the United States, and 1 percent of total US imports.

The ITC issued a preliminary determination that the imports of hot-rolled, cold-rolled, and corrosion-resistant carbon steel flat products from Japan had injured the US industry. This determination was reached despite the fact that a VRA (voluntary restraint agreement) had been implemented on exports of these products until the end of March 1992 and the actual export volume from Japan had been continuously and rapidly declining. Thus, the accuracy of the ITC's preliminary determination was highly questionable at the time, especially in light of Article 3.4 of the Tokyo Round Anti-dumping Code (present AD Agreement article 3.5), which states that "injuries caused by other factors must not be attributed to the dumped

imports." After the termination of the VRA, it is highly likely that anti-dumping measures became a substitute for the VRA, since anti-dumping measures relating to steel increased rapidly. In June 1993, after additional arguments by Japan on this matter, the ITC issued a final determination finding no injury from imports of hot-rolled and cold-rolled carbon steel products from Japan, but still finding injury from imports of corrosion-resistant carbon steel products. Just recently, the ITC findings of no injury from Japanese imports of hot-rolled and cold-rolled carbon steel were upheld by the Court of International Trade. It is also of note that AD cases brought immediately after losing out on a bid are increasing (Large Newspaper Printing Presses, Gas Turbo-compressor and Supercomputers). It is necessary to monitor whether dumping or another factor causes the injury.

The Anti-Dumping Agreement contains no provisions for aggregating the effects of dumping and subsidies ("cross-cumulation") when assessing injury, but the United States maintains that this is something that should be done. Should the United States actually engage in this practice, it is likely to be in contravention of the stipulation against attributing to dumping injury from other factors (under Article 3.5 of the Anti-Dumping Agreement).

Under its new anti-dumping legislation, the United States has adopted new rules for dealing with the so-called "captive production" situation. These rules will effect the way in which the United States determines the market share of the imports under investigation when producers consume significant production of the like product internally. The denominator in this calculation will be domestic US production minus the amount used in-house by US companies, which makes it easy to overstate changes in import share. The numerator will be total import volume minus imports that do not compete with domestic products (products consumed by the importers themselves). Adjustments are thus made to both the numerator and denominator. The United States maintains that there are no problems in this approach. In some sectors, however, the degree of adjustment between the two may be extremely unbalanced, making this an area where continued monitoring of administrative practice will be required.

(v) Like Products

Determination of "like products" is an area where problems are likely to occur because, as we have already noted (see 1.(3)(iii) above), so much is up to the discretion of authority. A specific example of this comes from Japanese television receivers, which had long been subject to anti-dumping duties. Authorities decided that LCD televisions were also within the scope of the duties because they are "units able to receive broadcast television signals and display images." This represents an arbitrary expansion of the scope of duties to subsequently developed products, a practice of questionable soundness.

We would also question the finding of like products for Colour Picture Tubes (CPTs). Large CPTs require different technology than small CPTs. Therefore, at the time of the original petition, no large CPT were even being produced in the United States, so there was no US industry to damage. In spite of this, investigators found "like products" because "even though large CPT require more advanced technology, there is a similarity between large and small screen sets above and beyond any technical differences."

We advocate the exercise of restraint in setting the scope for "similarity;" we do not think the scope of duties should be improperly expanded. If a country wishes to expand duties to later-developed products, we think it should redo the original investigation.

(vi) Other issues

Under US law, when dumping exports have ceased, the decision on whether to revoke antidumping measures must take into account the potential for dumping to recur in the future. At this juncture, exporters are asked to furnish proof that they will not dump in the foreseeable future, but the specific requirements that would constitute this proof have never been explicitly defined. This places an excessive burden of proof on the exporters. In this regard, the panel on Korean DRAMS stipulated that excessive burdens of proof should not be imposed, so we will need to monitor the behaviour of the government of the United States to comply with the Anti-Dumping Agreement.

(vii) Sunset Provision

Because past US anti-dumping laws lacked a sunset provision, such as that provided by the European Union, Australia, Canada, and other countries, there was no time limit on orders imposing anti-dumping measures. Consequently, anti-dumping duties tend to remain in force much longer in the United States than in other importing countries. Of the 53 products still subject to anti-dumping duties levied since 1970, 30 have been subject to duties for over ten years. (See Figure 5-7).

The AD Agreement provides for a "sunset clause" for the first time ever (Article 11.3). Anti-dumping duties automatically expire at the end of five years unless the duties are reviewed and found to have a positive impact on both dumping and injury. This led to the inclusion of a sunset clause in the new US Anti-dumping law. Under the law, all anti-dumping measures imposed prior to 1 January 1995 will be reviewed in order beginning July 1998 (Sunset Reviews). Some 46 antidumping measures against Japan have come up for review, and 21 had been terminated by 1 January 2000 (number as of December 1999). For another case, titanium sponges, the antidumping duty was revoked separately by an ITC "changed circumstances" review. On the other hand, the United States has decided to maintain 6 measures, and is currently in the process of expedited or full reviews for the remaining 19. The introduction of sunset reviews for antidumping measures was one of the results of the Uruguay Round negotiations, and we need to monitor the more than 300 reviews currently in progress to ensure that they are administered in an appropriate manner.

<Figure 5-7>Lifting or Continuance of Anti-dumping Duties (1970-present; products imported from Japan)

	1970-1979	1980-1998			Years in effect		
	Duties in Effect	Total Cases	Duties Lifted	Duties in Effect	10 years and more	5-10 years	Less than 5 years
US	13	54	15	39	12	14	26
EU	0	32	24	8	4	3	1
Canada	0	15	12	3	2	0	1

Note: Figure valid as of the end of December 1998

(viii) Actions by the United States Steel Industry

Since the summer of 1997, the US steel industry and labour unions have filed antidumping complaints against steel products in 12 categories from 25 countries including Japan. Anti-dumping investigations or measures have been implemented for 11 categories of

steel products that account for a combined 80 percent of Japanese steel exports to the US. The government of Japan has used diplomatic and other channels to express its concerns over the protectionist aspects of this abuse of the antidumping regime. The government also studied the WTO-conformance of measures at the request of our steel industry. This study found violations of the GATT and Anti-Dumping Agreement for the determination of injury, calculation of dumping margins and investigations procedures used in the antidumping case against hot-rolled steel sheets, and we have brought suit at the WTO. Consultations with the United States this January under Article 22 of the DSU failed to reach an agreement, so we requested to establish a panel in February. Japan should also study anti-dumping measures imposed on other steel products for their WTO-conformance.

(ix) Problems with the US Anti-Dumping Act of 1916

In November 1998, the Wheeling-Pittsburgh Steel Corporation of the United States brought suit at the Federal District Court of Ohio under the Anti-Dumping Act of 1916, alleging that nine importers, including three Japanese trading houses, had engaged in dumping with the intent to harm the US steel industry.

Japan sought consultations at the WTO with the United States over the matter because the 1916 act provides for compensation for damages and criminal penalties as relief measures rather than tariffs. In addition, the initiation of the investigation was not according to the procedures in the WTO Anti-Dumping Agreement. Japan therefore considers this statute to be inconsistent with the WTO Agreement, and if left intact it has the potential to nullify the entire antidumping framework that has been erected. After bilateral consultations in March of last year, we requested a panel in June, and the panel was established in July. It is scheduled to publish a final report in May 2000.

The EU has also brought the case before the WTO because US steel manufacturers have filed suits in federal district courts against European steel importers in the United States under the 1916 Antidumping Act. A panel was established for the EU-USA case in February 1999, and the final report was published in March 2000.

(2) European Union

Anti-dumping is an area of hidden protectionism in the European Union. Recent EU legislation contained amendments to bring European practice into line with the new anti-dumping Agreement. We consider this to be one of the major successes of the Uruguay Round negotiations. However, regarding abuse in this area which seems to have become common practice, there are legitimate concerns that abuse may continue where discretion is allowed even if the EU implementing legislation do not seem to violate the Agreement. This is especially the case in the European Union because authorities have greater discretionary powers than they do in the United States, and it is still too early to tell whether past administrative practices will really be corrected. It will, therefore, be necessary to monitor the administration of the new EU Anti-dumping provisions for conformity to the Anti-Dumping Agreement.

(i) Recent Trends

The number of complaints being filed is down from what it was in the 1980s and more measures are being eliminated. However, in 1997, two investigations were initiated. These are

two cases for which we will need to continue to monitor how Anti-dumping provisions are administered. There is great concern on these cases on various points, for example, it appeared that unfair price comparisons were made between export price and normal value (Personal Fax Machines) and product categories appeared to have been defined arbitrarily (Laser Optical Reading System for use in motor vehicles. The EU terminated the investigation without imposing antidumping duties.)

In June 1998, an anti-circumvention investigation was initiated against Japanese television camera systems though there is no rationale under the WTO for doing so.(The investigation was terminated in February, 1999)

The former Vice-President Sir Leon Brittan of the European Commission proposed in July, 1997 that anti-dumping procedures be improved and that "community interest" be defined. These proposals were based on criticisms of the anti-dumping procedures, and the definition of "community interest" for emphasizing the producers to the exclusion of other interested parties (for example, consumers). Sir Leon proposed that "community interest" be clearly defined, that anti-dumping investigation procedures be made more efficient, and that steps be taken to foster greater understanding of procedures in non-EU countries.

We welcome these proposals and the improvements they will bring to the impartiality and transparency of anti-dumping procedures. We believe it will be worthwhile for the European Commission to study them.

(ii) Problems Involved in Applying Anti-Circumvention Measures

The EU anti-dumping rules also contain anti-circumvention measures, which are different from those of the United States. The older rules only contained the importing country circumvention and the third-country circumvention taking advantage of EU rules of origin. However, new anti-circumvention rules have been drafted based on the panel findings from the parts dumping case and the opinions voiced in the Uruguay Round negotiations. The new rules define two conditions to be met and allow various measures to be taken that cannot be counteracted with traditional circumvention (importing country or third-country circumvention). The conditions are: 1) there has been a change in trading patterns that cannot be adequately explained by legitimate reasons or economic justifications other than the circumvention of anti-dumping duties; and 2) the effectiveness of the relief provided by Anti-dumping duties has been impaired and there is evidence of dumping in comparison with past normal prices. The EU has also added numerical criteria to its standards for determining traditional circumvention – 25 percent of value added or 60 percent of parts procurement. It has taken administrative steps to strengthen its anti-circumvention measures as well, by registering imported products and issuing non-circumvention certificates. However, these measures could also be applied against other forms of circumvention like country hopping. The scope of the measures is not only broad, but omits new investigations of dumping and injury. There are other problems too. In finding importing country or third-country circumvention, the EU rules do not consider the relationship between assemblers and companies subject to Anti-dumping duties, but they do include assemblers that began operations immediately before the initiation of investigations to be part of circumvention investigations. We would note that there is no rationale in the WTO Agreement for anti-circumvention rules at all, and these rules, depending upon how they are administered, could obstruct or impair legitimate investment activities.

Another troubling trend is the intention to investigate the origin of third-country products, where the European Union is imposing an anti-dumping duty to X country's products, and imposes the same anti-dumping duties as are imposed in imports from X country on the third country's products as well, without a dumping investigation, if the third-country products are found to be "X country's" under the EC's rules of origin. Disregarding for a moment the many problems in EC rules of origin, we would note the violation of the AD Agreement involved in imposing anti-dumping duties on third-country products just because of the way the rules of origin are administered and without engaging in ordinary dumping investigations.

Anti-circumvention investigations have also been initiated for 3.5-inch floppy disks from Taiwan and China, on electronic scales from Japan and Singapore, and on bicycle parts from China. Duties have been imposed on Chinese bicycle parts already. In June, 1998, an anti-circumvention investigation was initiated for Japanese television camera systems. Japan has protested this to the EU, as there is nothing in the WTO that justifies current anti-circumvention measures (including circumvention investigations), and arguing that the investigations are therefore illegal. As a result, the EU terminated its investigations in February, 1999, but is currently conducting an antidumping investigation of Japanese television camera system parts. We consider this case to be extremely problematic in terms of the Anti-Dumping Agreement, especially with regard to whether there is sufficient evidence for the authorities to decide to initiate a case of their own initiative. We will need to continue to monitor developments to ensure that investigation procedures comply with the rules in the Anti-Dumping Agreement.

<Box-3> Findings of the *Parts and Components* Panel

In 1987, anti-circumvention measures were applied to the parts for four products such as Japanese Copying Machines. Japan brought the measures to a panel, considering them to be a violation of the GATT. The panel found that the EU anti-circumvention duty was applied to products manufactured within the region and therefore was a domestic tax rather than an import duty. It then found the fact that this tax was imposed only on Japanese companies to be a violation of GATT Article III:2 (national treatment with regard to domestic taxation). After that, this point was amended in the EU legislation. The panel did not, however, render a ruling on whether the anti-circumvention rules themselves conformed to the GATT.

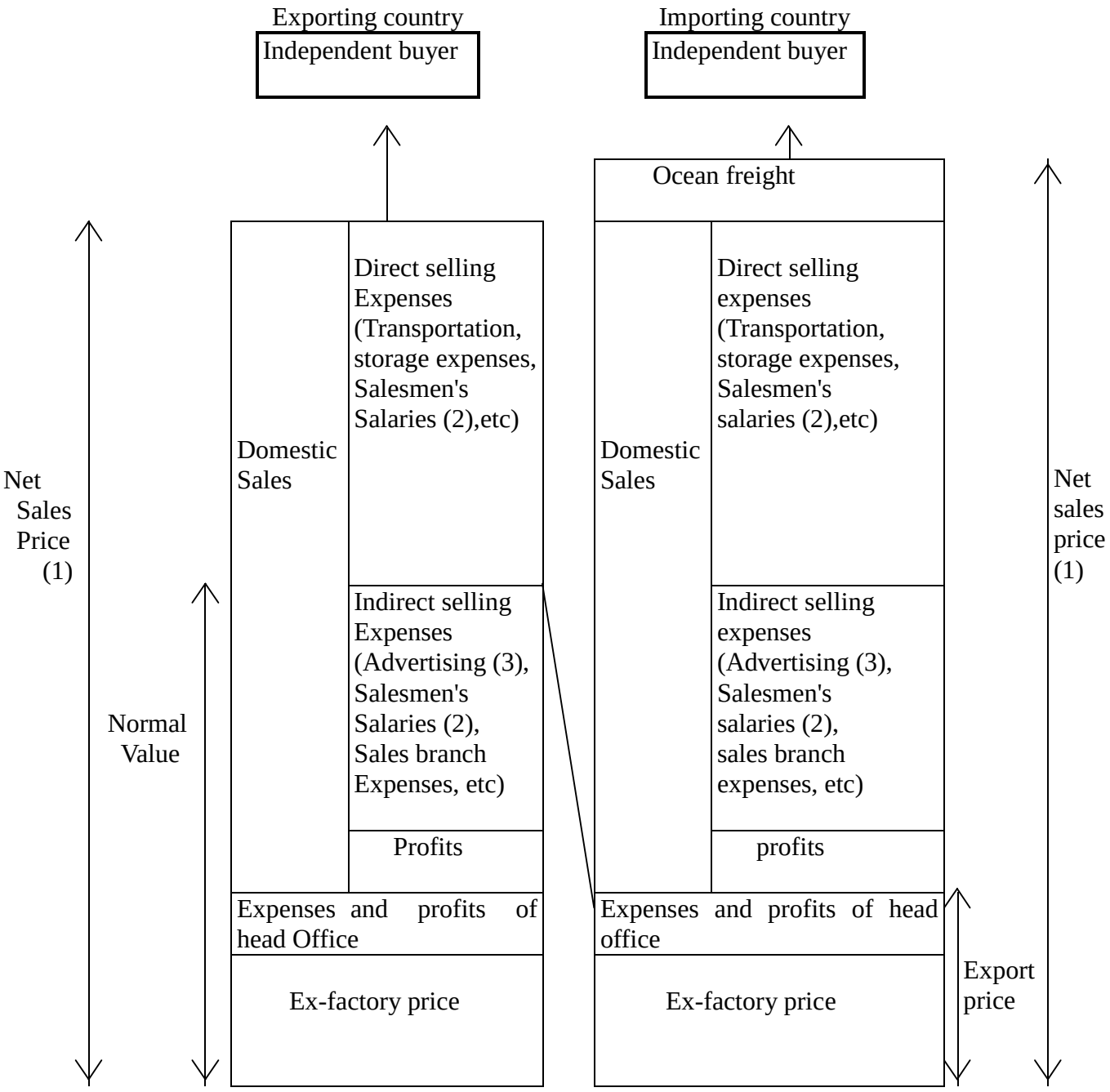
(iii) Problems Involved in Determining Dumping

Under EU practice, when a company employs an affiliated importer in the export market, the EU applies asymmetrical rules to adjust the prices. For domestic prices, the European Union deducts only direct selling expenses, while for export prices the European Union deducts direct and indirect selling expenses as well as profits. This leads to an overstatement of domestic prices, which makes it easy to artificially create and expand dumping margins (See Figure 5-8).

This problem affects every determination of dumping in cases involving affiliated importers, the degree of the problem is the only variable in any particular case. The ubiquitousness of this problem makes it especially serious. With respect to a case involving anti-dumping duties on Japanese audio cassette tapes, a panel was established in October, 1992. The panel reported in April 1995 and found EU price comparison methods and related rules to be in violation of the Anti-Dumping Agreement. The report was not adopted because of opposition by the European Union. The European Union, however, revised its AD

regulations in December 1996 partly in response to the panel's recommendation. Nevertheless we still need to monitor how the new regulations will be administered.

<Figure 5-8> Asymmetrical Comparison of Normal Value and Export Price in the European Union



Note: (1) Net sales price is equal to the price obtained by deducting discounts and rebates from sales price to the independent buyer.
(2) In this case, the amount of salesmen's salaries is allocated to two categories (i.e. 50% to direct selling expenses and 50% to indirect selling expenses)
(3) EC considers all the advertising expenses as indirect selling expenses.

After the EU regulation amendment, it has been possible to compare price symmetrically such as inclusive indirect expenses' adjustments in comparison of constructed export prices.

<Box-4> Panel on Anti-dumping Duties Levied by the European Union on Japanese Audio Cassettes

In May 1991, the European Union levied Anti-dumping duties on Japanese audio cassettes. Japan maintained that the methods used to calculate dumping were counter to the Tokyo Round Anti-dumping Code, and, in October 1992, a panel was established under the provisions of the Code. The panel report was issued in April 1995.

The report found the "asymmetrical price comparisons[*1]" used by the European Union in comparing normal (domestic) prices and export prices to be in violation of the Tokyo Round Anti-dumping Code. It advised the European Union to review its decision to impose Anti-dumping duties and to bring its Anti-dumping rules into conformity with the Code. (It did, however, determine that "zeroing[*2]" and "injury findings[*3]" were not necessarily in violation of the Code.)

Although the panel report was supported not only by Japan but also by many other Members, the panel report was left unadopted due to the opposition of the European Union. That particular panel was established under the Tokyo Round Anti-dumping Code and, therefore, did not come under the current dispute settlement procedure. As a result, the vote of all members was required for its adoption. Since the transitional period for disputes brought under the old Code expired at the end of 1996, the panel report can no longer be adopted.

This case is nonetheless significant because it made the European Union correct its legislation regarding the asymmetrical comparison which the panel report condemned. It marks the second case in which the unfair practices of Japan's trade partners were rectified based on GATT/WTO rules.

[*1.] Asymmetrical price comparisons: The Agreement stipulates that when calculating dumping margins, comparisons between export prices and domestic prices must be fair, and that any differences affecting price comparability must be adjusted for. However, what the European Union did was to only allow direct selling costs to be deducted from the domestic price, while from the export price it deducted full direct and indirect selling costs for affiliate companies and also the profits of affiliate companies. This overstated the domestic price and resulted in the creation and expansion of the dumping margin. (See Figure 5-8)

The panel found the European Union to be in violation of the Agreement because it did not make appropriate adjustments in comparisons of export prices and normal value even though the difference in indirect sales costs and profits was that to influence price comparisons. It therefore judged these provisions in the EU's basic rules to be "mandatory provisions in contravention to the Agreement."

[*2.] Zeroing (See Figure 5-1): The panel maintained that calculations of dumping margins are based on the idea that Anti-dumping duties should be imposed to the extent that the export price in individual transactions is below the domestic selling price. Therefore, the EU's method of calculating dumping margins did not necessarily expand the dumping margin and cannot be considered a violation of the Agreement.

[*3.] Injury findings: First, The European Union found injury even though there was only a slight increase in the absolute volume of imports from Japan and declines in relative volumes of EU consumption or production and no price undercutting. Second, in determining injury, the European Union aggregated imports from Japan and Korea. The panel found that the aggregation of dumped imports was not in violation of the Agreement because the Agreement did not require evaluation of competitive conditions for dumped imports from individual import sources. Based on this judgement, it did not render an individual ruling on related problems regarding imports from Japan.

The Anti-Dumping Agreement contains revisions requiring in principle that countries compare weighted averages to weighted averages or individual transactions to individual transactions (See 1.(2)(ii)(a)). However, it also contains exceptions to this principle that, under certain conditions (Article 2.4.2), permit comparisons between individual export prices and weighted-average normal prices. The new EU rules incorporate these exceptions, but the conditions for invoking the exceptions are open to different interpretation than those in the new Anti-Dumping Agreement. The EU rules state that comparison of weighted-average normal prices to individual export prices will be permitted if it is determined that the principle method of price comparison does not reflect the full degree of dumping. It is not clear how the European Union will determine what "the full degree of dumping" is, and arbitrary administration of this provision is of concern. Obviously, it should only be used under the exceptional circumstances stipulated in the Agreement.

The Anti-Dumping Agreement contains criteria for determining whether there are below-cost sales (Article 2.2.1) that require consideration of whether costs can be recovered in a reasonable period of time. The new rules of the European Union require adjustments when the determination of below-cost sales is influenced by new investments in production capacity or low production efficiency. The Agreement, however, specifies that start-up costs should be adjusted when they influence costs, and it will be necessary to monitor administration of the EU rules to ensure that they do not depart from the intentions of the Agreement.

(iv) Problems Involved in Determining Injury

Invocation of anti-dumping measures requires that dumping causes injury to the domestic industry of the importing country, but EU injury findings contain much that is of doubtful conformity to this rule. One example comes from the review investigation for the anti-dumping duties levied by the EU Commission on Japanese ball bearings (in excess of 30-mm external diameter) in September 1992. The investigation again found dumping, but appeal to the Court of First Instance overturned this ruling in May 1995 because of problems with evidence used to find injury. The principal reason for the nullification of the Commission's finding was that neither the Commission nor the Council of Ministers had proved that there was injury or threat of injury, (As a specific example, the European Commission maintained that dumped imports had increased 2.7 percent in volume terms, but in fact total sales volumes in the common market, including imports, had increased 9.5 percent and sales in the common market by common market producers had increased 14.8 percent by volume.) This was the first verdict involving Japanese firms since the Court of First Instance began hearing anti-dumping cases in March 1994 (previous to that time, they had been heard only by the European Court of Justice.). It is a verdict that we are pleased with because of the court's willingness to examine the facts in detail. The EU Council of Ministers was dissatisfied with the verdict and has appealed it to the European Court of Justice, however, in February 1998, this appeal was rejected by the European Court of Justice.

There is also the case of Japanese audio cassettes that was disputed in a panel. In this case, the European Union cumulated the effects of imports from Japan and Korea in making its evaluation, but the panel did not decide whether it was consistent or not. The anti-dumping Agreement, contains criteria to be used in cumulative evaluations of injury, and it will be necessary to monitor future administration for compliance with these criteria in injury findings.

In addition, the new EU rules allow the impact of past dumping to be considered in injury findings. These practices are questionable in terms of the Agreement's provision that damage from other factors not be attributed to dumping.

(v) Like Products

We have already considered problems in the identification of "like" products (see 1.(4)(iii) above). During the review, the EU included products such as high-speed copy machines and high-performance television camera systems that were not part of the original anti-dumping investigation, and it ultimately expanded the scope of the products on which duties were imposed. The investigation into Laser Optical Reading System (presumed primarily to consist of car CD decks) that was initiated in October, 1997 also used an extremely broad definition that tries to encompass products that the parties filing the complaint were not even producing, products that were clearly not "like products" and that include the components that were not the subject of the complaint. The investigation was terminated without finding any injury and causation. We will need to continue to monitor to ensure that any future investigations are conducted with fair and rigorous similar products definitions.

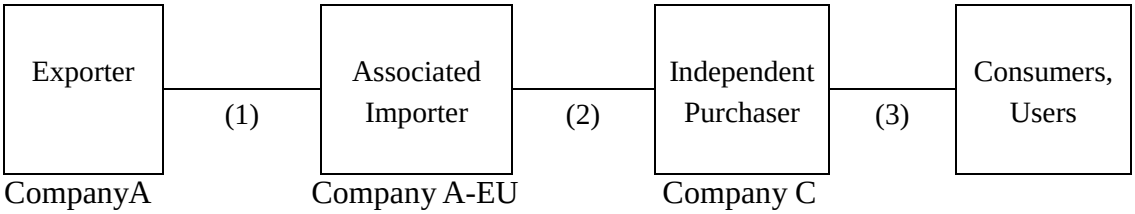
<Box-5> Deduction of Anti-dumping Duties as Costs

Under the EU policies governing refunds, when a request for a refund of anti-dumping duties is made and the import transaction is carried out by an affiliate of the exporter, there are problems stemming from the way in which constructed export prices are calculated. The price used to determine the existence of dumping is reduced by the amount of anti-dumping duties already paid (in calculating constructed export prices for the purpose of refunds, the amount of tax is deducted from the resale price along with sales and administrative expenses and profits). In effect, the European Union will not make a full refund of an anti-dumping duty unless the resale price is raised by at least twice the amount of the dumping margin (See Figure 5-9). This same problem has also been seen in reviews of anti-dumping measures (the case of Japanese bearings).

The issue arose because there are cases in which the anti-dumping duty that is supposed to be reflected in the export price is not reflected adequately because of the mediation of affiliated importers. The rule seeks to counteract such opaque dealings on the part of the exporters. The Anti-Dumping Agreement stipulates that no deduction for anti-dumping duties paid should be applied in determining the amount of duties to be refunded, if conclusive evidence is provided (Article 9.3.3). The EU amended its Directive 11 (10) to bring it in line with these provisions.

<Figure 5-9> "Duty as a Cost" Rule in the European Union

"Duty as a cost" rule is always applied to cases where the export sales are made through an importer associated to the exporter.



As shown in the above, in the case of associated importers, the export price (1), which is compared with the domestic price, is calculated by deducting the costs and profit of company A-EU from the sales price (2) to an independent purchaser.

	Original Investigation	Refund without "Duty as a cost"	Refund with "Duty as A cost"
A: Normal value (ex-factory)	100	100	100
B: Export price			
(1)Price to first independent purchaser	110	120 (dumping eliminated)	120 (dumping eliminated)
(2)Deduction of costs and profit of associated importer	- 15	- 15	- 15
(3)Deduction of costs from factory to CIF point of importation	- 5	- 5	- 5
(4)Deduction of AD duty	-	-	- 10
(5)Constructed Export price(ex factory) (=(1)-(2)-(3))	90	100	90 (=(1)-(2)-(3)-(4))
C: Dumping amount (=A-(5))	10	0	10
D: Refund	-	10	0

(3) Australia

It could be considered as a principle of the Anti-Dumping Agreement that home market sales of individual exporters in the ordinary course of trade is the proper object of comparison, as the general rule in the Anti-Dumping Agreement is to determine dumping margins for each product for individual exporters. It is unfair to penalize a company that is itself fully in compliance with the norms of the Anti-Dumping Agreement by using the prices set by other companies to determine normal value. An individual exporter has no control over the prices of other exporters. The Australian anti-dumping laws, however, permit comparison between the domestic price of other exporters or sellers and the export price, where the exporter does not sell in the ordinary course of trade in the home market. The Australian Government insists that as long as any products by any of the other exporters or sellers are sold in the ordinary course of trade, the domestic price by those companies could be used as the basis for normal value used for the comparison. However, as mentioned above, the principle of the Anti-Dumping Agreement is that anti-dumping duties are levied on sales of individual exporters, and it is doubtful whether the interpretation of the Australian government is consistent with the Anti-Dumping Agreement. A better approach would be establishing constructed normal value or using price exported to an appropriate third country as normal value. Either constructed value or third country export price would be based on information for the particular exporter under investigation.

(4) Canada

The provision concerning the determination of normal value in Canada's new anti-dumping legislation is similar to Australia's. Where there are insufficient sales in the exporter's domestic markets, Canadian law allows the selling prices of other sellers in the export market to be used to determine appropriate pricing. It is doubtful whether this conforms to the Agreement.

In injury findings, Canada also allows cross-cumulation of the effects of dumping and subsidies imports. The Agreement allows the authorities to assess the cumulative effects of dumping by multiple countries, but it does not contain any provision for cumulation of dumping and subsidies. It does, however, specify that injury from other factors shall not be attributed to dumping, which puts these provisions in a doubtful light.

(5) Others Countries

In addition to the traditional users of antidumping measures--the US, EU, Australia, and Canada--more developing countries are also making use of antidumping procedures. There has been a marked increase in the antidumping investigations and measures initiated against Japan by India, Indonesia, Venezuela, Mexico, and Egypt. These cases too will need to be watched for conformance to the rules of the Anti-Dumping Agreement.

In spite of the fact that neither the GATT nor the Anti-Dumping Agreement contains any rationale for anti-circumvention provisions and is slated for discussion in the Anti-Dumping Committee, the United States, European Union and others (Mexico, Venezuela, Iceland.) have already gone ahead and introduced anti-circumvention provisions. In addition Malaysia may introduce anti-circumvention measures as well. This is a problem that was discussed earlier in this chapter.

Unlike customs unions, where only a single domestic industry is recognized (Article 4 of the AD Agreement), in free trade agreements, the industry of each constituent member is considered a separate domestic industry. When agreements stipulate that members of free trade agreements that are not customs unions will not invoke anti-dumping duties against each other, it is likely that it will be a violation of Articles I and XXIV of the GATT.